No. 49567-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

J.P.,

Appellant.

Grays Harbor County Superior Court Cause No. 16-8-00068-0

The Honorable Judge David Edwards

Appellant's Motion for Accelerated Review and Opening Brief

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1. J.P.'s guilty plea was entered in violation of his Fourteenth Amendment right to due process.
2. The trial court erred by accepting J.P.'s guilty plea.
3. The record does not affirmatively establish that J.P.'s guilty plea was knowing, intelligent, and voluntary.
4. The record of the plea hearing does not prove that J.P. understood the law, the facts, and the relationship between the two.

> **ISSUE 1:** The record of a plea hearing must affirmatively establish the accused person's understanding of the law, the facts, and the relationship between the two. Was J.P.'s guilty plea entered in violation of his Fourteenth Amendment right to due process because he was affirmatively misinformed regarding the law?

5. The court violated J.P.'s statutory right to proof beyond a reasonable doubt by imposing a manifest injustice disposition based in part on the prosecutor's "bare allegations."
6. The court violated J.P.'s Fourteenth Amendment right to due process by imposing an aggravated sentence based in part on "facts" that had not been proved beyond a reasonable doubt.

> **ISSUE 2:** The state must prove factual allegations in support of a manifest injustice determination beyond a reasonable doubt. Did the court violate J.P.'s constitutional and statutory right to proof beyond a reasonable doubt by relying in part on allegations in the state's sentencing memorandum to find facts supporting a manifest injustice disposition?

7. The trial court's manifest injustice disposition is not supported by the evidence.
8. Under the facts of this case, the actions of J.P.'s parents should not result in a harsher sentence for J.P.

> **ISSUE 3:** A manifest injustice disposition must be vacated if based on an aggravating factor that is insufficiently substantial and compelling to distinguish the case from other cases. Did the trial court err by basing J.P.'s manifest injustice disposition

on the actions of his parents, considering his adult sister's availability to provide him a home and supervision?

9. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because J.P. is a juvenile and because he is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

J.P. is a fifteen-year-old child who scuffled with a school-mate. CP 1; Motion and Declaration filed June 1, 2016, pp. 2-3, Supp. CP. Psychological Evaluation filed 8/18/16, p. 2, Supp. CP. He was charged with fourth-degree assault. CP 1.

Neither of his parents appeared at his initial appearance or his arraignment. See Minutes dated June 3 and June 9, 2016, Supp. CP. His mother had previously refused to participate in an evidence-based program called Functional Family Therapy, which had been recommended by his probation counselor. RP 10-11, 17; State's Sentencing Memorandum filed 8/18/16, pp. 6-7, Supp. CP.

A restraining order barred J.P.'s father from having contact with him. State's Sentencing Memorandum filed 8/18/16, p. 6, Supp. CP; Psychological Evaluation filed 8/18/16, p. 3, Supp. CP. Like J.P.'s mother, his father also refused to participate in Functional Family Therapy. RP 10-11, 17.

After more than a month in custody,[1] J.P. pled guilty to simple assault. CP 3; RP 1-7. Neither parent was present at the plea hearing. RP 3; Clerk's Minutes dated 7/7/16, Supp. CP.

[1] See Minutes dated June 3, June 9, and July 7, 2016. Supp. CP.

The person who filled out J.P.'s plea form described the elements of the offense as "Unlawful touching of another." CP 3. The plea form did not indicate that the touching must be harmful or offensive. CP 2-9. Nor did the document explain the prosecutor's burden to prove criminal intent. CP 2-9.

J.P.'s statement "in [his] own words" described the offense as follows: "April 11, 2016 I assaulted Damien Anderson." CP 8. At the plea hearing, the only discussion regarding the elements came when the judge asked J.P.: "Who did you assault?" and he replied "Damian [sic] Anderson." RP 5.

At some point prior to disposition, J.P.'s mother did appear in court. She was under the influence of alcohol and morphine. State's Sentencing Memorandum filed 8/18/16, pp. 6-7, Supp. CP; Psychological Evaluation filed 8/18/16, p. 5. His father never appeared in court. See RP 1-21; Minutes dated June 3, June 9, July 7, July 21, and August 18, 2016, Supp. CP

J.P.'s standard range for the offense was detention of up to 30 days. CP 4. The prosecution filed a sentencing memorandum recommending a manifest injustice disposition of 52-weeks. State's Sentencing Memorandum filed 8/18/16, pp. 1, 3-9, Supp. CP.

The memorandum outlined numerous allegations regarding J.P. and his family. State's Sentencing Memorandum filed 8/18/16, pp. 1-9, Supp. CP. Instead of describing the offense charged in this case, the prosecutor outlined the facts of a companion case.[2] State's Sentencing Memorandum filed 8/18/16, pp. 2-3, Supp. CP.

At the disposition hearing, J.P.'s attorney argued for a standard range disposition and told the judge that J.P.'s adult sister was available to provide a home for him in another county. RP 15. J.P. told the court that his offending stemmed at least in part from the negative influence of his peers. RP 16.

The court announced that J.P.'s parents' "refusal to participate in functional family therapy just tips me over." RP 17. The court imposed an exceptional disposition of 52 weeks, based on aggravating factors which included (1) recent criminal history or failure to comply with conditions, (2) "Respondent exhibits dangerous and reckless behavior which threatens the community and himself," (3) "Lack of parental control," (4) "high risk to reoffend," and (5) "Doesn't take responsibility for his actions." CP 11, 13.

[2] J.P. pled guilty to simple assault in the companion case, and received a sentence of 30 days. RP 18.

At the prosecutor's request, the court announced that "the factual assertions in [the state's] memorandum will be considered as part of the record in this dispositional proceeding." RP 18-19. This is also reflected in the clerk's minutes from the disposition hearing. Minutes dated August 18, 2016, Supp. CP.

J.P. appealed the manifest injustice disposition. CP 19. He later filed an Amended Notice of Appeal, challenging the finding of guilt as well. Amended Notice of Appeal, filed 10/27/16, Supp. CP.

ARGUMENT

I. THE CASE MUST BE REMANDED TO ALLOW J.P. TO WITHDRAW HIS GUILTY PLEA BECAUSE THE RECORD DOES NOT AFFIRMATIVELY ESTABLISH HIS UNDERSTANDING OF THE LAW, THE FACTS, AND THE RELATIONSHIP BETWEEN THE TWO.[3]

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). Absent an affirmative showing that a guilty plea is knowing, intelligent, and voluntary, the plea must be vacated. *State v. A.N.J.*, 168 Wn.2d 91, 119, 225 P.3d 956 (2010). Here, the record suggests that J.P.'s guilty plea was

[3] The voluntariness of a guilty plea may be raised for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001); *State v. Mendoza*, 157 Wn.2d 582, 589, 141 P.3d 49 (2006).

not knowing, intelligent and voluntary. Accordingly, he must be allowed to withdraw the plea. *Id.*

The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). To satisfy the requirements of due process, the accused person must understand the law, the facts, and the relationship between the two. *State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006).

Here, the record of the plea hearing does not affirmatively show that J.P. understood the law, the facts, and the relationship between the two. This is so because his plea form affirmatively misstated the law.

A person is guilty of simple assault if he "assaults another." RCW 9A.36.041. In the case of assault by means of a common-law battery, this requires proof of two additional elements. First, the state must show "an unlawful touching of another with criminal intent." *State v. Kindsvogel*, 149 Wn.2d 477, 483, 69 P.3d 870 (2003). Second, the state must prove that the touching was "harmful or offensive." *State v. Osman*, 192 Wn. App. 355, 378, 366 P.3d 956 (2016).

Here, the Statement of Defendant on Plea of Guilty misstated the law. On its first page, the plea statement purported to outline "the elements" of simple assault. CP 3. Instead, however, the document provided an incomplete and misleading definition of the crime. CP 3.

Specifically, paragraph 4 of the plea statement listed the "elements" as "unlawful touching of another." CP 3. It made no mention of criminal intent or the requirement that the state prove that the touching was harmful or offensive. CP 3.

The misstatement was not cleared up elsewhere in the document. Paragraph 16 of the plea statement (in which J.P. was directed to "state in my own words what I did that makes me guilty of this crime") indicated only that "I assaulted Damien Anderson." CP 8. During the plea colloquy, the judge asked J.P.: "Who did you assault?" RP 5. The judge did not go over the definition and did not correct the misstatement on the first page of the plea statement.

If not for the initial misstatement, paragraph 16 of the plea form and the judge's colloquy would likely have been sufficient. However, because the plea form affirmatively misstated the law, more was required. Under the misstatement, J.P. may have believed that any unlawful touching qualified as an assault, even if unintentional and even if it was neither harmful nor offensive.

The record does not affirmatively establish that J.P. understood the law, the facts, and the relationship between the two. *R.L.D.*, 132 Wn. App. at 706. Without such a showing, the record does not reflect a knowing, intelligent, and voluntary plea. *Id.*

J.P.'s conviction violated his Fourteenth Amendment right to due process. *A.N.J.*, 168 Wn.2d at 119. The case must be remanded to the superior court to enable him to withdraw his plea. *Id.*

II. THE MANIFEST INJUSTICE DISPOSITION MUST BE VACATED AND THE CASE REMANDED FOR A NEW DISPOSITION HEARING.

A. The disposition court should not have relied on bare allegations contained in the state's sentencing memorandum as a basis for imposing an exceptional sentence.

A prosecutor's "bare allegations" to the court are not evidence "whether asserted orally or in a written document." *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012). Here, the court's findings and manifest injustice disposition were based in part on bare allegations.

By statute, any facts supporting a manifest injustice disposition must be proved beyond a reasonable doubt. RCW 13.40.160(2); *State v. Tai N.*, 127 Wash. App. 733, 740, 743, 113 P.3d 19 (2005) (holding that clear and convincing evidence standard is equivalent to beyond a reasonable doubt standard). In addition, due process requires the state to prove beyond a reasonable doubt any facts supporting an aggravated sentence. *Blakely v. Washington*, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (addressing adult sentencing); *In re Gault*, 387

U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (applying due process protections to juvenile offender proceedings).[4]

Because of this, a manifest injustice sentence must be reversed unless a rational trier of fact could (1) find the facts supporting the disposition beyond a reasonable doubt and (2) find that a standard range sentence would effectuate a manifest injustice beyond a reasonable doubt. *Tai N.*, 127 Wn. App. at 741; *C.B.*, 61 Wn. App. at 285-86. The trial court's reasons for imposing a manifest injustice sentence "must be clear in the record." *Tai N.*, *at* 743; RCW 13.40.230. The court must specify those portions of the record material to the manifest injustice disposition. JuCR 7.12(e).

Here, the court failed to specify which portions of the record supported which aggravating factor.[5] RP 8-20; CP 10-18. However, the court made clear it was relying, at least in part, on the state's sentencing memorandum. RP 18-19. Although the court also considered the

[4] Although review is for substantial evidence, the evidence must be stronger than would be sufficient to prove facts by a preponderance of the evidence. *Id.; In re C.B.*, 61 Wn. App. 280, 285-86, 810 P.2d 518 (1991). Instead, the state must introduce "evidence from which a rational trier of fact could find [the required facts] beyond a reasonable doubt." *Id.*, at 285 (addressing termination findings).

[5] The court considered the psychological evaluation and the state's sentencing memorandum as the basis for its findings. RP 18-19.

psychological evaluation,[6] it may have concluded that some facts were proved beyond a reasonable doubt because the "evidence" appeared in both the sentencing memorandum and the psychological evaluation.

But a prosecutor's sentencing memorandum does not contain evidence. *Hunley*, 175 Wn.2d at 915. Instead, it consists of bare allegations. *Id.* Such bare allegations do not amount to proof by a preponderance of the evidence, much less proof beyond a reasonable doubt. *Id.*

Because it rested in part on bare allegations, the manifest injustice disposition must be vacated. *Hunley*, 175 Wn.2d at 915. The case must be remanded for a new disposition hearing.[7] *Id.*

A. The disposition court should not have relied on the actions of J.'s parents without considering the availability of his adult sister to act as custodian.

Generally, a standard range disposition is adequate to achieve the goals of the Juvenile Justice Act. *Tai N.*, 107 Wn. App. at 745. This includes rehabilitation of the juvenile offender. *Id.* A sentence above the

[6] The psychological evaluation was not formally offered or admitted into evidence as an exhibit; however, the court "direct[ed]... that it be made a part of the record of [the] dispositional proceeding." RP 18.

[7] In the alternative, the case must be remanded for the court to specify which portions of the record supported its findings beyond a reasonable doubt.

standard range may only be imposed if disposition within the range "would effectuate a manifest injustice." RCW 13.40.160 (2).

An aggravating factor cannot justify a manifest injustice disposition if it is insufficiently substantial and compelling to distinguish the crime from others in the same category. *State v. T.E.C.*, 122 Wash.App. 9, 18, 92 P.3d 263 (2004). Under the facts of this case, at least one aggravating factor is insufficiently substantial and compelling to justify a manifest injustice disposition. *Id.*

The court's disposition rested in part on "Lack of Parental Control." CP 11. As the judge made clear, at least part of his concern involved the family's refusal to participate in Functional Family Therapy. RP 17. Other factors likely included the mother's appearance in court under the influence of alcohol and morphine, and the restraining order prohibiting the father from contact with J.P. State's Sentencing Memorandum filed 8/18/16, pp. 6-7, Supp. CP; Psychological Evaluation filed 8/18/16, pp. 3, 5, Supp. CP.

Under the facts of this case, "lack of parental control" was not sufficiently substantial and compelling a basis to justify an exceptional disposition about the standard range. *Id.* This is so because J.P. had an older sister who was willing to take custody of him. RP 15. In addition to removing him from a dysfunctional home environment, this would have

the added advantage of separating him from negative peer influences, which J.P. described as a major factor in his offending.

The court did not acknowledge or ask about J.P.'s sister. Because the court relied on lack of *parental* control as an aggravating factor, the court should have inquired about the sister's ability to provide a proper home and adequate supervision.

The court did not indicate that it would impose the same disposition based solely on the remaining aggravating factors. RP 8-20; CP 10-18. Because of this, the disposition must be vacated and the case remanded for a new sentencing hearing. *See, e.g., State v. Weller*, 185 Wn. App. 913, 930–31, 344 P.3d 695 (2015), *review denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015) (remand appropriate unless court "specifically state[s] that it would impose the same length of exceptional sentence" based only on proper aggravating factors.)

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace this court's obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn. App. at 388.

J.P. is only fifteen years old. CP 1. The court found him indigent for purposes of this appeal. CP 20-21. The *Blazina* court indicated that courts should "seriously question" the ability of an adult who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

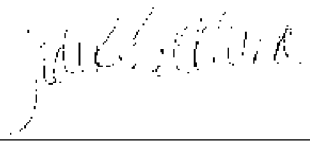
For the foregoing reasons, the case must be remanded to the superior court to allow J.P. to withdraw his guilty plea. In the alternative,

the disposition order must be vacated and the case remanded for a new disposition hearing.

If the state substantially prevails, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on October 27, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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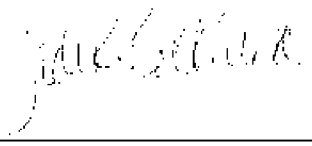
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 27, 2016.



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